

The preliminary hearing Order should be reversed to the extent it denied claimant's request for medical benefits for treatment of the lower extremities. However, the Order should be affirmed to the extent it denied benefits for the right upper extremity.

The Appeals Board has the jurisdiction and authority to review the Administrative Law Judge's preliminary hearing findings under K.S.A. 1996 Supp. 44-534a, when the disputed issue is whether a worker sustained an accidental injury which arose out of and in the course of employment.

Claimant alleges he sustained injury to the left hip and both knees while working for the respondent each and every workday commencing November 1994 and continuing through the present. Claimant testified that he was respondent's personnel, accounts payable, and workers compensation manager. In addition, he also managed the cafe that respondent owned in St. Paul, Kansas. Claimant testified he began performing more physical work in the cafe in November 1994 which required him to be on his feet five or six hours per day, and work 60-70 hours per week. He believes the additional physical activity required to run the cafe caused injury to his left hip and both knees.

In November 1994, claimant reported to respondent's company president, Eugene Beachner, the problems he was having with his knees. Mr. Beachner advised claimant to slow down. In February 1995, claimant told Mr. Beachner that he needed to quit the cafe work because of his symptoms. Claimant's last day at the cafe was March 13, 1995. At that time respondent reduced claimant's office hours to 40 per week.

After March 1995, claimant's symptoms subsided. However, in February 1996, respondent moved claimant out of the company's main offices into an office trailer. Claimant was then required to walk back and forth between the main office and trailer approximately 15 times per day for various reasons. Because of that walking, claimant testified that his knees began to hurt worse than when he was working at the cafe.

Claimant also alleges he injured his right arm at work on June 5, 1995, when he slipped and grabbed a sink to catch himself.

Respondent contends claimant's present knee complaints are not related to his work but instead are the result of a 1968 car accident which initially rendered claimant paraplegic from the waist down. Following that accident, claimant had intermittent back pain, bilateral foot drop, and required canes and short leg braces to walk. However, claimant testified that he did not have any knee problems until they surfaced in November 1994.

In support of his claim, claimant presented the medical report of Edward J. Prostic, M.D., an orthopedic surgeon in Kansas City, Missouri, who saw claimant one time at his attorney's request. In his report dated July 25, 1996, Dr. Prostic wrote:

"During the course of his employment through February 7, 1995, Leonard W. Kennedy **sustained injuries to his legs from repetitious minor trauma from prolonged standing and walking.** He has radiologic evidence of early degeneration of the patellofemoral joints.

It is suspected that he is developing a condition analogous to a post-polio syndrome with fatigue of his remaining muscles. His clinical examination does not support the diagnosis of torn meniscus but if a tear is present it would be the most easy condition to correct. It is suggested that he have an MRI of his right knee to rule-out such a diagnosis.” (Emphasis added.)

On the other hand, in support of their position, the respondent and its insurance carrier presented the reports of James Armstrong, M.D., Greg Horton, M.D., and David Tillema, M.D.

Dr. Armstrong, an orthopedic surgeon in Pittsburg, Kansas, saw claimant at the insurance company’s request on May 17, 1995, and October 17, 1995. In his report dated May 17, 1995, Dr. Armstrong wrote to the insurance company and said:

“[I]t appears that the examinee’s **symptoms are related to the prolonged working hours and being on his feet** and I anticipate that those symptoms will reduce with time and I hope to be able to re-evaluate him in 4 months.” (Emphasis added.)

On page 3 of his second report dated October 17, 1995, Dr. Armstrong concluded:

“I do not feel that there was any worsening of his lower extremity situation associated with his employment at the restaurant. I feel that the **forces that he places on his lower extremities when walking** coupled with his previous back injury account for the findings and his history.” (Emphasis added.)

On his own initiative, on October 26, 1995, claimant saw Dr. Horton who is associated with the Kansas University Medical Center. In his medical reported dated October 26, 1995, Dr. Horton summarized his opinion as follows:

“It is my impression that the majority of his lower extremity complaints are a result of a symptom complex which seems to be resultant from his altered gait pattern which requires significant muscle expenditure as well as altered mechanics. I think that with his external rotation and chronic valgus stress on his knees that this is what is responsible for the majority of his symptoms. I do not see any definite joint laxity or bioarthritic process. **I think that his increase in activities has exacerbated this and contributed to the symptoms complex.** He states when he is doing sedentary type activities that his symptoms

are much less. With regard to treatment of this I think that activity modification is going to be the mainstay of treatment. I do not see any sort of surgical treatment at this point. . . . ” (Emphasis added.)

Respondent also introduced the November 14, 1996, medical report from David A. Tillema, M.D., from Kansas City, Missouri, who saw claimant at respondent’s attorney’s request. On page 4 of the medical report, Dr. Tillema wrote:

“The question has been raised as to whether this gentleman has any increased disability or impairment from his prolonged working hours and being on his feet for a prolonged period of time. There is no question this gentleman does have a preexisting impairment and disability from an old fracture to the thoracolumbar spine and with obvious partial paraplegia. **Being on his feet could have caused increased burning and increased discomfort, however, these were more on a temporary basis.** I therefore feel that there has been no increase in this gentleman’s partial impairment or his disability from being on his feet for a prolonged period of time. I therefore feel that there has been no change in this gentleman’s total permanent and partial impairment from his work. (Emphasis added.)

“Mr. Kennedy does have a permanent and partial impairment. Perhaps his concerns can be worked out through the Americans With Disabilities Act and further accommodation to Mr. Kennedy should be considered under this act. It would be very helpful to him if he did not have to do a lot of walking and moving back and forth.”

Upon reviewing the above medical opinions, the Appeals Board notes that all four doctors believe that the claimant’s increased activities exacerbated and worsened, at least temporarily, claimant’s condition. Therefore, the Appeals Board finds that claimant’s prolonged walking and standing, while working for the respondent, has aggravated his bilateral knee problems and that claimant is entitled to the medical treatment for the lower extremities that he sought at preliminary hearing. However, the evidence fails to establish either an injury or timely written claim pertaining to the right upper extremity. Therefore, the Administrative Law Judge’s denial of benefits for the June 5, 1995, alleged accident is affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order dated December 2, 1996, entered by Administrative Law Judge John D. Clark should be, and hereby is, affirmed to the extent it denied workers compensation benefits for the alleged accident to the right upper extremity,

but should be, and hereby is, reversed to the extent that it denied medical benefits for the alleged accidental injury to the lower extremities.

IT IS SO ORDERED.

Dated this ____ day of January, 1997.

BOARD MEMBER

c: William L. Phalen, Pittsburg, KS
Wade A. Dorothy, Lenexa, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director